

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
A. M. Tours, Inc. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Corporation :
Franchise Tax under Article(s) 9A & 27 of the :
Tax Law for the Year 1978.

State of New York :

ss.:

County of Albany :

Doris E. Steinhardt, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 18th day of February, 1986, he/she served the within notice of Decision by certified mail upon A. M. Tours, Inc. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

A. M. Tours, Inc.
1650 Broadway, Rm. 704
New York, NY 10019

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
18th day of February, 1986.

Doris E. Steinhardt

John Corigliano
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of

A. M. Tours, Inc. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :

of a Determination or Refund of Corporation

Franchise Tax under Article(s) 9A & 27 of the :

Tax Law for the Year 1978.

State of New York :

ss.:

County of Albany :

Doris E. Steinhardt, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 18th day of February, 1986, he served the within notice of Decision by certified mail upon Albert A. Medenilla, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Albert A. Medenilla


84-16 193rd St.

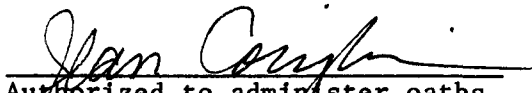
Jamaica, NY 11423

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
18th day of February, 1986.





Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

February 18, 1986

A. M. Tours, Inc.
1650 Broadway, Rm. 704
New York, NY 10019

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1090 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Law Bureau - Litigation Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Albert A. Medenilla
84-16 193rd St.
Jamaica, NY 11423
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
A. M. TOURS, INC.

DECISION

for Redetermination of a Deficiency or for
Refund of Franchise Tax on Business Corporations :
under Articles 9-A and 27 of the Tax Law for :
the Fiscal Year Ended September 30, 1978. :

Petitioner, A. M. Tours, Inc., 1650 Broadway, Room 704, New York, New York 10019, filed a petition for redetermination of a deficiency or for refund of franchise tax on business corporations under Articles 9-A and 27 of the Tax Law for the fiscal year ended September 30, 1978 (File No. 40402).

A hearing was held before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 10, 1985 at 2:45 P.M., with additional documentary evidence to be submitted by September 27, 1985. Petitioner appeared by Albert A. Medenilla, President. The Audit Division appeared by John P. Dugan, Esq. (Anne W. Murphy, Esq., of counsel).

ISSUE

Whether the Audit Division properly characterized certain funds paid by petitioner to its president as distributed or undistributed earnings, rather than as compensation.

FINDINGS OF FACT

1. For the fiscal year ended September 30, 1978, for federal corporation income tax purposes, petitioner, A. M. Tours, Inc., filed a U.S. Small Business Corporation Income Tax Return, reflecting taxable income at line 28 in the

amount of \$12,658.00; the corporation did not avail itself of any deduction for compensation to officers. Petitioner subsequently submitted an amended federal return, deducting officers' compensation of \$12,658.00 and reporting a taxable income of zero.

2. For the fiscal year ended September 30, 1978, petitioner filed a New York State franchise tax report, remitting therewith the minimum tax of \$250.00.

3. Petitioner is engaged in business as a travel agency. Its sole officers and shareholders are Albert Medenilla and his wife, Amparo. Mr. Medenilla manages and devotes most of his time to petitioner's business.

4. On March 30, 1982, the Audit Division issued to petitioner a Notice and Demand for Payment of Franchise Tax, assessing franchise tax under Tax Law Article 9-A for the fiscal year 1978 in the amount of \$1,041.00, with accrued interest. The assessment was predicated on the disallowance of petitioner's deduction of compensation to officers. On his 1978 individual federal return, Mr. Medenilla had reported such compensation on Schedule E, Supplemental Income Schedule, as income from a small business corporation. The Audit Division therefore concluded that petitioner improperly reduced its federal taxable income by \$12,658.00, earnings distributed (or undistributed) to a shareholder. At the hearing held, counsel to the Audit Division conceded that petitioner's allegedly improper deduction of officers' compensation did not constitute a mathematical error (transcript p. 7).

5. At irregular intervals, Mr. Medenilla draws advances from the corporation and records the amounts thereof in journal account 104, denominated advances to officers and employees. According to such account, he received \$6,801.16 during the fiscal year ended September 30, 1978. At the close of fiscal year 1978, petitioner showed a profit of \$12,658.00. Mr. Medenilla then made an adjusting

entry to account 104: he debited the account in the amount of \$5,856.84, the excess of \$12,658.00 (petitioner's profit) over \$6,801.16 (the total of his advances).

6. On his Schedule SE, Computation of Social Security Self-Employment Tax, submitted to the Internal Revenue Service for 1978, Mr. Medenilla reported net earnings of \$14,508.00: \$1,850.00 derived from A. M. Tax & Accounting Services, plus \$12,658.00 derived from A. M. Tours, Inc.

CONCLUSIONS OF LAW

A. That in accordance with the provisions of Tax Law section 1081(d), where a mathematical error appears on a return, the Audit Division "shall notify the taxpayer that an amount of tax in excess of that shown upon the return is due, and that such excess has been assessed" via the issuance to the taxpayer of a Notice and Demand for Payment of Franchise Tax. As the Audit Division so conceded, petitioner's mischaracterization of a portion of the payments to its president (\$5,856.84) as compensation to officers, rather than as its own distributed or undistributed earnings, and the resultant overstatement of deductions did not constitute a mathematical error within the meaning of section 1081(d). (Compare Matter of Martin Hurwitz, State Tax Comm., June 29, 1983, wherein the taxpayer's use of an erroneous minimum tax figure was found to be a mathematical error; and Internal Revenue Code section 6213[g][2], which defines the term "mathematical or clerical error" for purposes of restrictions on deficiencies.) The disallowance by the Division of petitioner's deduction for compensation to officers should therefore have been accomplished through the issuance of a Notice of Deficiency (section 1081[a]), not through an assessment.

B. That the period of limitations for the issuance of a notice of deficiency against petitioner with respect to the fiscal year ended September 30, 1978 has expired (section 1083[a]).

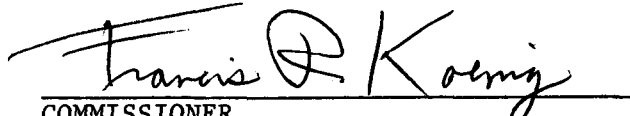
C. That the petition of A. M. Tours, Inc. is granted, and the Notice and Demand for Payment of Franchise Tax issued on March 30, 1982 is cancelled.

DATED: Albany, New York

STATE TAX COMMISSION

FEB 18 1986


PRESIDENT


COMMISSIONER


COMMISSIONER